IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

MOLLIE E. DUPREE and WILLIAM E. DUPREE, *Petitioners*,

vs.

C. W. MANSUR, *Respondent*.

No. 124.

BRIEF FOR PETITIONERS.

STATEMENT.

Out of the complicated and somewhat confusing multiplicity of facts and pleadings set forth in the record, the following are believed to be the facts essential for the consideration and determination of the question presented by the application for certiorari granted by this court in this cause:

On the 31st day of December, 1894, O. Bailey conveyed lot 1, block 2, in Waco, Texas, in which he had an undivided one-half interest, to William E. Dupree, reserving in the deed a vendor's lien to secure five purchase money promissory notes of $900.00 each, all dated December 31, 1894, to the order of O. Bailey, and maturing, respectively, at one, two, three, four and five years from their date. Record, p.

57. On the same date, Dupree executed a deed of trust upon the said undivided one-half interest in the lot to W. W. Lastinger, "for the better securing of the said notes, with all interest due thereon, to the payee or endorsee or holder thereof," and providing, first, that, if there should at any time be default for five days in the payment of the interest due on the notes, "then, at the option of *the said O. Bailey, or the holder of the said promissory notes*, the whole principal, with the interest then accrued, shall at once become due and payable, and the holder may proceed to collect the same by sale under this deed of trust, or otherwise as said holder may elect"; and, secondly, "should the said W. W. Lastinger fail or refuse or be disqualified from acting thereunder, *the said O. Bailey, or his legal representative*, shall have full power to appoint a substitute in writing, who shall have the same powers which are hereby delegated to the said W. W. Lastinger, trustee."

In brief, the deferred purchase money promissory notes were secured, first, by a vendor's lien reserved in the conveyance by Bailey, the grantor, and, secondly, by the deed of trust to Lastinger, upon the undivided one-half interest conveyed by the vendor, the latter conveyance giving to the *holder of the notes* the right to declare their maturity in case of default in the payment of interest, and to *O. Bailey or his legal representative* the right to designate a trustee in the stead of Lastinger, should the latter fail, refuse or become disqualified to act.

Dupree, who was already seized of the other undivided one-half interest, and who by virtue of the Bailey deed became the sole owner of the lot, conveyed all of it except the rear forty feet to the petitioner Mollie E. Dupree on Decembr 2, 1896 (Record, p. 65). The rear forty feet were conveyed to her on May 8, 1902, by one J. C. Birkhead, to whom William E. Dupree had conveyed it (Record, 63-4), thus vesting in her the title to the whole, subject as to an un-

divided one-half interest to the vendor's lien retained by Bailey and to the deed of trust to Lastinger, both to secure the five promissory notes of $900 each.

The validity of this conveyance to Mrs. Dupree, or of her title to the lot in question, subject to the stated liens, is not assailed.

On December 3, 1896 (Record, p. 99), Dupree executed a deed of trust to J. C. Birkhead, upon certain merchandise, goods, chattels and real estate, not including the lot here in controversy, to secure his indebtedness to various creditors, arranged preferentially into groups A, B and C, among which creditors were the Provident National Bank, of Waco, and one S. W. Slayden, who had then become the holder of three of the five promissory notes above referred to. Two days later, December 5, 1896 (Record, p. 89), two of the non-preferred creditors, i. e., The Mansur-Tebbetts Implement Company and the Washburn & Moen Mfg. Co., filed a bill against Wm. E. Dupree, Birkhead and the Provident National Bank, alleging that the latter had other security for its claims against Dupree than the Birkhead deed of trust, and praying, accordingly, the appointment of a receiver and a marshaling of assets—neither the said Mollie E. Dupree nor the said Slayden being parties to this bill, nor the said petitioner's property, lot 1 in block 2, being described or referred to in it. On the same day (Record, p. 108), W. B. Belknap & Co. filed a similar bill against both the petitioners, Birkhead, the Provident National Bank, S. W. Slayden and others, alleging that the said Bank and Slayden had security for their claims in addition to the Birkhead deed of trust, and praying the appointment of a receiver and a marshaling of assets, the petitioner Mollie E. Dupree being made a party defendant in respect to a certain alleged vendor's lien on lot 7, in block 2, which it was claimed had been transferred to her by her co-petitioner and husband, without consideration. The two bills were consolidated, and

one Frank S. Finks was appointed receiver of all the property described in the deed of trust to Birkhead, and of all the collateral security held by the Provident National Bank, S. W. Slayden and others (Record, p. 122). Slayden answered, admitting that he held, as additional security, three of the five promissory notes hereinbefore referred to, secured by the vendor's lien retained in the Bailey deed, which notes would fall due on the first day of January, 1898, 1899 and 1900 (Record, p. 145). It further appeared that, at the time of the making of the deed of trust to Birkhead, Slayden, in consideration of being put into the first preferred class of creditors, agreed to release the vendor's lien retained in the Bailey deed (Record, pp. 49-50, 57); and, though the execution of the release is not shown, Lastinger released the deed of trust securing these notes (Record, pp. 66-67) on December 29, 1897, which release has not been vacated or attacked in any of the several suits contained in the record.

By its final decree in the consolidated suits, the court decreed that Belknap & Co. take nothing by their bill (Record, p. 134), which bill, as above stated, was the only one to which petitioner Mollie E. Dupree was made a party, and, in it, only in respect to her ownership by gift from her husband of a certain promissory note secured by a vendor's lien on lot 7. Further, after passing upon the claims of a large number of intervening creditors, allowing some and rejecting others, the final decree allowed the claim of Slayden to be paid out of the proceeds of the property described in the deed of trust to Birkhead, but required him to endorse to the receiver Finks the three unpaid $900 promissory notes, secured as aforesaid by the vendor's lien retained by Bailey in his deed to Wm. E. Dupree (Record, p. 145)—this decree being passed June 26, 1897, some six months prior to the maturity of any one of the three notes in question. The decree, thereupon, also decreed foreclosure of the deed of trust from Dupree to Birkhead, as to all the property de-

scribed in it, which deed of trust, as above stated, contains no reference to lot 1, in block 2, nor does the decree in any manner refer to that lot except as being the lot on which a vendor's lien had been retained to secure the three unpaid promissory notes—no foreclosure or enforcement of the said vendor's lien, nor any steps to that end, being embraced or referred to in it. Slayden was, accordingly, paid the amount of his claims, from the proceeds of the property embraced in the Birkhead deed of trust, and assigned the three promissory notes in question to Finks, the receiver, who sold them, for $300, to J. C. Duke, the sale being confirmed by the court (Record, p. 41).

Duke first brought suit on these notes in May, 1898, in the State Court, seeking foreclosure of the Lastinger deed of trust, which suit was by him dismissed and stricken from the docket after petitioners had fully answered. He thereupon filed his bill, in March, 1899, in the United States Circuit Court for the Northern District of Texas, reciting the provision of the deed from Bailey to Dupree that, in default of the payment of interest on the notes, the holder had the option to mature the principal thereof, "and your orator avers that such default has been made, and that the whole amount of said notes has become due," the bill thereupon praying that he should be subrogated to the rights of the prior holder of the notes, that the mortgage to Lastinger should be foreclosed in his favor, and that the property, lot 1 in block 2, should be sold for satisfaction of the notes (Record, pp. 68-75).

To this bill, the petitioners demurred upon various grounds, among them that, in the consolidated suits under which Duke acquired his title, there had been no claim of subrogation to the liens securing it, nor any notice to petitioners of any claim of subrogation; that, in these suits, there had been no adjudication concerning the rights of petitioner Mollie E. Dupree; that application to reform that decree was

barred by complainant's laches in failing to file his bill within six months after the passage of the decree, and that complainant, being a mere purchaser of the notes, was not entitled to maintain a bill for reformation (Record, pp. 79-81), which demurrer was "in all things sustained," and the bill dismissed without prejudice, with leave to file a supplemental bill before the rule day of December, 1900. Duke did not avail himself of this leave, but prosecuted an appeal, with the result that the decree sustaining the demurrer and dismissing the bill was, at the November term, 1902, affirmed (Record, pp. 82-88).

Duke then transferred the three notes to the respondent Mansur, who, under the provision in the Lastinger deed of trust, authorizing *Bailey* or his legal representative to appoint a new trustee in Lastinger's stead, undertook, himself, to appoint one A. S. Keady as a substituted trustee for Lastinger, who had released the property, as already shown.

Keady thereupon advertised the property, lot one, in block two, for sale, whereupon the petitioners filed their bill in the District Court of McLennan County, Texas, subsequently transferred to the United States Circuit Court for the Western District of Texas, against Mansur and Keady, to enjoin the sale (Record, pp. 1-11), in which bill, as amended, they alleged that the only authority to appoint a substituted trustee was in Bailey or his legal representative, that Mansur, who was merely the alleged assignee of the promissory notes, had no authority to appoint Keady to the position of substituted trustee, that such appointment carried with it no power or authority to sell, but that such sale would cast a cloud upon the title of the petitioner Mollie E. Dupree, decreasing the value of the property, etc. Mansur answered and, on February 22, 1904, filed his cross bill against the petitioners, recapitulating the proceedings in the consolidated suits, the purchase by Duke of the three promissory notes from the Receiver Finks, that Mansur had succeeded Duke

as holder and owner thereof, and praying that the Lastinger deed of trust should be decreed a valid and existing lien upon the undivided one-half interest in lot one, block two, to secure the payment of the said notes, that the vendor's lien retained in and by the Bailey deed should also be established, and that the petitioners should be foreclosed of their equity of redemption and claim to the said property upon their failure to pay the same, etc. (Record, pp. 18-25). This cross-bill, upon which the decree below under review was based, it will be observed, was filed on February 22, 1904, six years after the maturity of the notes if they matured upon the filing of Duke's bill in 1898, exercising the option to mature them because of the default in the payment of interest, or four years, one month and twenty-two days after the maturity of the last of them, if that maturity be determined by the face of the notes, the Texas statute of limitations barring action upon such notes in four years. After evidence taken, the Circuit Court enjoined the attempted sale by Keady as prayed, and dismissed the cross-bill of Mansur (Record, pp. 61-62), which action was reversed by the United States Circuit Court of Appeals of the Fifth Circuit (Record, pp. 168-70), and the cause remanded with instructions for a decree foreclosing the vendor's lien reserved in the Bailey deed of December 31, 1894, from which decree the present application for certiorari was prayed and allowed.

ASSIGNMENTS OF ERROR.

The court below erred as follows:

I. In holding that the decree in the consolidated suits requiring Slayden to assign the promissory notes to Finks, Receiver, and the receiver to make sale thereof, was conclusive upon the petitioners, or either of them, with respect to lot 1 in block 2.

II & in reversing the decree of the Circuit Court.

III. In holding that the respondent is entitled to a decree foreclosing in his favor the vendor's lien reserved in the deed of December 31, 1894, as security for the promissory notes.

I

It is difficult to see in what respect, or upon what theory, the decree in the consolidated suits can be regarded as conclusive upon, or as in any manner affecting, the petitioners, or either of them, in respect to lot 1 in block 2, the property involved in the present suit.

As to the Belknap suit, the only one to which the petitioner Mollie E. Dupree was a party, the decree was that the complainant take nothing by his suit. The only relief sought in and by it against Mrs. Dupree was in relation to a promissory note secured on lot 7, which the bill in effect charged had been given to her by her husband without consideration, to hinder, delay and defraud his creditors. The bill was, in effect, dismissed against the complainant, with costs.

With respect to the other of the consolidated suits, that brought by the Mansur and Tebbetts Implement Co. *et al.*, Mrs. Dupree was not a party to it, nor was the property involved in this suit mentioned or referred to in it. Its only relation to the subject matter of the present controversy grows out of the fact that Slayden, the then holder of the three promissory notes, for which he had, also, the security of the Birkhead deed of trust, intervened to have his debt paid from the proceeds of the property covered by that deed, and was permitted to do so upon condition of surrendering these notes to the receiver, for the benefit of the less fortunate creditors, under the doctrine of marshalling assets. No subrogation was prayed, or effected, by virtue of that decree. Duke simply became the holder of the promissory notes by purchase, and took them with such incidents as would have accompanied their purchase if made privately. Conceding for the present purpose that, among these incidents, was the

security afforded by the Lastinger deed of trust and the vendor's lien, there was nothing in the decree in the nature of a foreclosure, or of an extension of the period of limitations, or any right enlarging, or additional to, those which Slayden would have had if he had relinquished the security of the Birkhead trust and retained these notes as the security for his debt.

A sale of property under judicial proceeding concludes no one who is not a party to those proceedings. United Lines Telegraph Co. vs. Boston Dep. & Trust Co., 147 U. S., 431, 448; Pittsburg R. R. Co. vs. Long Island Trust Co., 172 U. S., 493, 515; Meyer vs. Construction Co., 100 U. S., 457-8.

Mrs. Dupree being no party to the bill upon which the decree in the consolidated suits was rendered, nor to any bill the relief prayed against her in which was allowed, or related to her ownership of or interest in lot 1, in block 2, she cannot be bound, conclusively or otherwise, by the decree in these causes.

"Whatever title the law gives, the purchaser takes, no more and no less; and he must govern himself accordingly." Waples vs. United States, 110 U. S., 630, 633. Under the decree in question, the law gave, and Duke took, simply the title to the notes which Slayden endorsed to the receiver for the purposes of sale—no more and no less, and he accordingly acquired no rights except those which resulted from the endorsement of the notes to him.

II.

In the second place, it was also error, it is respectfully submitted, to hold that the respondent was entitled, under his cross-bill or otherwise, to foreclosure of the vendor's lien retained by Bailey in his deed of December 31, 1894, conveying the undivided one-half interest in lot 1 in block 2 to

William E. Dupree, under whom petitioner Mollie E. Dupree derives her title.

With the exception of the two Duke bills of 1898 and 1899, one of which was dismissed by himself and the other by the decree of the court, the cross-bill of respondent, filed February 22, 1904, was, and is, the first effort to enforce either the Lastinger trust, or the vendor's lien for the payment of the three promissory notes. At the date upon which it was filed, all three of the notes were barred by the Texas statute of limitations; and under the laws of that State, as established by its own Supreme Court, the bar of the statute, which was duly pleaded, was a bar, also, to the respondent's recovery under either the deed of trust or the vendor's lien.

> "The lien by the mortgage on the land was but an incident to the debt, and, when the principal falls, the incident must fall with it. The debtor, to secure the appellee against loss, had hypothecated this tract of land, and the law had provided most ample and energetic remedies to enforce the lien thus given. But the time within which the law would afford its aid was limited, and appellee, having failed to avail himself of these aids in the time prescribed, cannot ascribe his loss to any other cause than to his own laches, nor can he require the courts to introduce and adopt new and unusual remedies for his relief." Duty vs. Graham, 12 Tex., 427, 437; Perkins vs. Stearne, 23 Tex., 561; Ross vs. Mitchell, 28 Tex., 150-4.

The only authority relied upon below in opposition to the rule here contended for was Goldfrank *et al.*, vs. Young, 64 Tex., 432, 438; and this authority, so far from overruling those above cited, corroborates them. In that case, a trustee under a deed of trust was proceeding to exercise the power of sale conferred by it to enforce the payment of a promissory note barred by limitations, and the bill was filed

for injunction to restrain him from doing so. Upon the well and long established principle that the statute of limitations is simply a defense to actions, and not a bar to any other remedies which the creditor may have to enforce the payment of his claim, the Texas Supreme Court reversed an injunction allowed below, but declared that, had the holder of the note sought *affirmative* relief from the court, as in the case at bar, it would have been beyond its power to grant it.

> "If the appellees had brought an action at law upon their note, or had sought a foreclosure of the trust deed in an equity proceeding, no court of this State would have given them any relief if the appellee had relied upon the bar of the statute."

In the case at bar, the relief sought by the petitioners below was against the clouding of their title by a pretended substituted trustee, appointed without authority by the holder of the promissory notes, against which attempted sale the Circuit Court granted, properly we submit, an injunction as prayed. The Circuit Court of Appeals reversed this action, and upholds an affirmative equity proceeding, represented by the respondent's cross-bill, for the foreclosure of a trust deed to secure barred promissory notes, notwithstanding the fact that the defendants relied upon the statute. This, we submit, is in direct conflict with the uniform decisions of the Supreme Court of Texas, upon a question of purely state law.

The decree in the Circuit Court of Appeals for foreclosure of the vendor's lien presents the same fatal error. The Texas statute of limitations, as construed by its courts, does not bar the claim of the vendor of land under an express vendor's lien reserved in the deed of sale. Notwithstanding the fact that the deferred purchase money notes are barred by the statute, the vendor may still retake the land if the notes are unpaid; but this right is one personal to himself,

and does not pass to an assignee or endorsee of the notes.

Thus in Elliott vs. Blanc, 54 Tex., 216, 218, it was held:

> "By the transfer of a note given for the purchase money of land, the holder acquires the equitable lien upon the land to which the vendor is entitled as security for its payment, but he gets by such transfer neither legal nor equitable title to the land. If, by his neglect or laches, his action on the note is barred, he cannot maintain, as holder of such note, an action of trespass to try title for the land against the vendee or subsequent purchaser."

In Hale vs. Baker, *et al.*, 60 Tex., 217, it was sought to recover the amount of notes given for the purchase money of the land, accompanied by foreclosure of the vendor's lien, to which suit the defendants pleaded the statute of limitations. The plea being overruled below, the judgment was reversed by the Supreme Court.

> "The court below determined this case upon the erroneous view, as we conceive, that the holder of the superior title to land under a conveyance of it to another party, in which he has reserved a vendor's lien to secure the purchase money, may, because the contract of sale is executory, enforce the lien by suit for the money, notwithstanding the purchase money note may be barred by the statute of limitations. * * * Where the vendor has reserved his lien in the deed, he may enforce the contract specifically by suing upon the purchase money note and foreclosing the lien, or he may, in effect, rescind the contract on default of the note, by disregarding his conveyance and selling the land to another, or recover back his possession by suit. But when the evidence of his debt is barred by limitations, his opportunity for election is lost, and he must rely for his remedy upon the assertion of such rights, only, as his superior title to the land confers upon him as owner. He cannot recover the unpaid purchase money."

In other words, the vendor, notwithstanding the bar of the statute, may rescind the sale because of the failure to pay, and thereupon may sue for and recover the land, *or* he may sue upon the deferred purchase money notes, provided they are not barred. If barred, he can no more maintain an action upon notes of this character than upon any other. The assignee or endorsee of such promissory notes, on the other hand, is limited to the one remedy of suit upon them. He who never had title to the land may not annul the sale because of the failure to pay, nor, if he did so, would the effect be to restore to him a title, having never had any, upon which he might sue in ejectment or trespass.

In Stephens vs. Mathews' Heirs, 69 Tex., 341-4, the action was to sell land for the purpose of paying a promissory note given for the deferred purchase money, to which action the defendants pleaded the statute of limitations. The trial court instructed the jury that, if the note expressly reserved a vendor's lien, the verdict should be for the plaintiffs, notwithstanding the fact that the note was barred by the statute of limitations. A judgment based upon this instruction was reversed on appeal, the court saying: "It is true that the assignee of a note secured by lien may enforce the lien, but it has never been held that the holder of a note given for the purchase of land, and secured by an express lien, he not being the vendor, has any title whatever to the land, and the fact that the note is barred by limitation cannot confer upon such holder a right he would not have had if it were not barred. The endorsee or assignee of such a note, when barred by limitation, has neither a right in nor to the land for which it was given, nor a right to collect the note if its maker interposes the statute of limitations. His right in such case is gone. The vendor of land sold on a credit, where an express lien is reserved, is held to retain the legal title, and he may enforce the payment of the

purchase money by a sale of the land under a decree, or, in the absence of equitable considerations forbidding it, he may cancel the executory contract of sale; but an endorsee or assignee of one or all of the purchase money notes has no right to cancel the contract of sale, or to recover the land in default of payment of the purchase money. His sole right is to have the land sold and its proceeds applied to the satisfaction of the promissory notes held by him; and, if he fails to do this before the notes are barred, like the holder of any other lien, his right will be gone if the maker of the note relies upon the bar of limitation. The vendor of land, by an executory contract, being the holder of the legal title, is not confined to one remedy, as is the person to whom he may transfer purchase money notes, and he may cancel the contract of sale and recover his land, although the purchase money notes may be barred by limitation; but this results from the fact that he has never ceased to hold the title to the land."

Had the statute of limitations run against the notes during and because of the pendency of the consolidated suit, the result would not have been to relieve the bar, since, under the Texas decisions, even an injunction against sale under a trust deed does not suspend the running of the statute. Daw vs. Andrews, 88 Tex., 524. But, as above pointed out, the statute had not commenced to run, as against any one of them, at the time of their sale to Duke in the consolidated suits.

Such are the decisions of the Supreme Court of Texas, upon these questions of purely local, State law, which decisions, it is well settled, are conclusive upon the Federal Courts in cases arising in and governed by the laws of the State.

With respect to the rule that, upon such questions, the Federal Courts will follow the decision of the courts of the State, this court has said: "So far does this

doctrine extend, that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it." Louisiana vs. Pillsbury, 105 U. S., 278, 294; Moreley vs. Lake Shore Ry., 146 U. S., 162-6; Elmendorf vs. Taylor, 10 Wheat., 152, 159; Bank vs. Daniel, 12 Pet., 32; R. R. Co. vs. Trust Co., 173 U. S., 99, 107.

The identical proposition relied upon by the petitioners, and denied by the respondent, in this case, is recognized and declared by this court in Ewell vs. Daggs, 108 U. S., at p. 147, as follows: "If that debt (i. e., a debt secured by the lien of a mortgage) is barred by the statute of limitations, then, according to the law in Texas, the foreclosure suit is barred, but not otherwise; for the mortgage is a mere incident of the debt. It was so held by the Supreme Court of Texas in Eborn vs. Cannon's Admr., 32 Tex., 231. * * * 'The mortgage was but an incident of the debt, and the incident in law, as in logic, must abide the fate of the principal.' "

Upon such questions, "the law, as held by the Supreme Court of Texas, must furnish the rule of decision." Cordova vs. Hood, 17 Wall., p. 9.

The cause of action being the debt, and its recovery the sole purpose sought to be accomplished, the case is one of concurrent jurisdiction between the courts of law and of equity, and, therefore, one in which the Statute of Limitations is binding in the latter forum. Bank vs. Daniel, 12 Pet., 32, 56; Bacon vs. Howard, 20 How., 22, 26. Even if the respondent's cause of action were based upon a purely equitable right, the statute would be applied by analogy and would be equally conclusive. Miller's Heirs vs. McIntyre, 6 Pet., 61, 66-7; Willard vs. Wood, 1 App. D. C., 44, 59-

60, affirmed 164 U. S., 502, 520. The only cases in which the bar of the statute has not been applied by analogy, where suit has been instituted after the lapse of the statutory period, or in which such delay has not been held fatal laches, are those in which there has been fraudulent concealment of the cause of action, or other special and peculiar circumstances; among which a mere voluntary, unexplained failure to sue within the time prescribed by the statute for the purpose has never been included.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed, and that of the Circuit Court re-instated and affirmed.

SLEEPER & KENDALL,
J. J. DARLINGTON.
Solicitors for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1907.

MOLLIE E. DUPREE AND WILLIAM E. DUPREE,
Petitioners,

vs.

C. W. MANSUR, *Respondent.*

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

I.

The petition rests on a supposed erroneous construction and application of the statute of limitations of Texas. It falls within the rule announced in In Re Wood, 143 U. S., 206, where it is said:

> "But we do not regard the inquiry as to whether it was settled law in the State of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

II.

None of the conditions recognized by the decisions of this

court as warranting the issuance of a writ of certiorari, are disclosed by this application or the record.

American Construction Co. v. Jacksonville, Tampa & Key West R. R. Co., 148 U. S., 372;
Forsythe v. Hammond, 166 U. S., 506;
United States v. Three Friends, 166 U. S., 1;
Lau Ow Bew v. United States, 144 U. S., 47;
Smith v. Vulcan Iron Works, 165 U. S., 518.

III.

We think it might readily be shown that the decision complained of does not conflict with those of the Texas supreme court. Be this as it may, the essential rights of the parties are not involved. The record discloses that a contract remedy involving foreclosure under deed of trust granting power of sale was being exercised when petitioners sued out an injunction. They failed to sustain the claims on which were predicated their right to an injunction. Meantime the trustee in the deed of trust (a substitute appointed on failure of the trustee named in the deed to act) died. The Court found that the debt had not been paid. The debt existing, limitation, if it prevented the foreclosure under the cross bill, did not affect the contract remedy to be exercised under the power of sale in the trust deed. Therefore, if the Court had dismissed the bill and the cross bill, the land would have been sold by another substitute trustee appointed to exercise the power. In other words, the petitioner's land would have been subject to sale to secure the identical debt.

Smith v. Vulcan Iron Works, 165 U.S.,526. Where it is said: "That difference, not affecting the essential rights of the parties, is no ground upon which this Court should exercise its discretionary power of issuing a writ of certiorari." That limitation would not bar sale under trust deed, we cite:

Goldfrank v. Young, 64 Tex., 432;
Fievel v. Zuber, 67 Tex., 275;
Converse v. Davis, 90 Tex., 468.

IV.

The respondent was interfered with by injunction. His preparation for sale by posting notices rendered nugatory, and his sale wrongfully held up until his trustee died, all in the effort of petitioners to defeat the *debt*. Having failed, they should not now be heard to interpose an ineqitable, if not technical, obstacle to his realizing on his security.

Goldfrank v. Young, 64 Texas, 432.

V.

We respectfully submit the Petition should be refused.

W. McCormick

Solicitor for C. W. Mansur, Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 124.

MOLLIE E. DUPREE AND WILLIAM E. DUPREE,
PETITIONERS,

v.

C. W. MANSUR, RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Brief and Argument for Respondent.

J. M. McCORMICK,
HANNIS TAYLOR,
Solicitors for Respondent.

PRESS OF GIBSON BROS.,
WASHINGTON, D. C.
1909.

Supreme Court of the United States.

OCTOBER TERM, 1908.

MOLLIE E. DUPREE AND WILLIAM E. DUPREE, PETITIONERS,
v.
C. W. MANSUR, RESPONDENT.
No. 124.

BRIEF AND ARGUMENT FOR RESPONDENT.

STATEMENT OF THE CASE.

When, on December 31, 1894, O. Bailey conveyed the lot in question, in which he had an undivided half interest, to William E. Dupree, he reserved in the deed a vendor's lien to secure five notes for the purchase money of $900 each, all dated December 31, 1894, and payable to the order of Bailey at one, two, three, four, and five years from their date. The deed recites that the "notes are for purchase money for property herein conveyed and the vendor's lien is hereby reserved on the said property to secure the above described notes." On the same day Dupree executed a deed of trust upon the said undivided one-half interest in the lot to W. W. Lastinger, trustee, "for the better securing of the said notes, with all interest

due thereon, to the payee or endorsee or holder thereof." Subject to these burdens, and with express notice of them, Dupree conveyed the land to his wife, Mollie E. Dupree, on December 2, 1896. Bailey sold and duly transferred by endorsement the five notes in question, thus doubly secured, to S. W. Slayden, to whom Dupree paid the two notes maturing respectively on January 1, 1896, and January 1, 1897. The controversy in this case is therefore limited to the collection of the purchase money evidenced by the three notes maturing January 1, 1898, January 1, 1899, and January 1, 1900.

On December 3, 1896, W. E. Dupree conveyed certain of his real and personal property to J. C. Birkhead by a deed of trust for the benefit of his creditors named therein, arranged in classes. Thereafter certain of his secured creditors instituted two suits in the United States Circuit Court for the Northern District of Texas, for the foreclosure of the said deed of trust to said Birkhead. Those suits, afterwards consolidated, are entitled in the index of this record: "Original bill of Mansur and Tebbetts Implement Company *et al. v.* W. E. Dupree, *et al*, and order appointing receiver. * * * Original bill of W. B. Belknap and Company *v.* Provident National Bank *et al.*" These bills were filed for the appointment of a receiver and the marshalling of assets. Dupree was a party, defendant, to both, and his wife a party, defendant to one of them. After the consolidation of the two suits, Frank F. Finks was appointed receiver of all the property described in the deed of trust to Birkhead and of all the collateral securely held by the Provident National Bank, S.W. Slayden and others. Slayden intervened in said consolidated suit, setting up his ownership of the three promissory notes, secured by the said vendor's lien and deed of trust. The final decree, rendered June 30, 1897, so far as it relates to his rights, reads as follows:

"It is further ordered, adjudged and decreed by the court that the report of the master on the intervention of S. W. Slayden be and the same is hereby approved and confirmed and that the said S. W. Slayden have and recover of the defendant W. E. Dupree the sum of $3,085.50 with interest on $2,805.00 thereof at the rate of 8 per cent. per annum together with costs by him in this behalf incurred with a lien on the funds in the registry of the court and with priority thereon and hereinafter provided. And it further appearing to the court that the debt of the said S. W. Slayden against the said W. E. Dupree consists of vendor's lien notes executed by the said W. E. Dupree to O. Bailey and transferred by indorsement of the said O. Bailey to the intervener, S. W. Slayden, under date of December 31, A. D., 1894, each in the sum of $900, the first maturing January 1, 1898, the second maturing January 1, 1899, and the third maturing January 1, 1900, and bearing interest at the rate of 8 per cent. per annum, payable annually and evidenced by interest coupons attached to said notes, said notes being secured by vendor's lien on Lot 1, Block 2, of the City of Waco, McLennan County, Texas. It is hereby ordered that upon payment to the said intervener of his recovery out of the funds in the registry of the court, the said intervener at once deliver to F. F. Finks, receiver herein, said notes and said interest coupons thereon endorsed to the said receiver without recourse, and the said F. F. Finks, receiver, is hereby ordered forthwith to sell said notes and interest coupons at public or private sale for cash and pay the net proceeds of said sale into the registry of this court to be applied as the other funds in the registry of this cause." Neither Dupree nor his wife, both of whom were parties to that decree rendered in the consolidated suit, ever made any objection to such decree or order, and neither of them in or about the pro-

ceedings claimed any right to have said property relieved of the indebtedness on it by payment out of said fund, and neither of them suggested that the provisions of the decree were inequitable or unjust to them or any other person, and neither of them has ever appealed from the decree. Slayden received the full amount of his claim out of the fund then in the registry of the court, and endorsed the notes and delivered them to the receiver, who thereafter sold them to J. C. Duke for the sum of $300, which sale to Duke was confirmed by the court. In May, 1898, Duke instituted a suit in the District Court of McLennan County, Texas, for foreclosure of the deed of trust from Dupree to Lastinger which he voluntarily dismissed; and in March, 1899, he filed a similar bill in the United States Circuit Court of the Northern District of Texas which was dismissed without prejudice.

Thereafter the said Duke assigned the three promissory notes in question by endorsement to C. W. Mansur, the respondent here, who demanded of the said Lastinger, trustee in the deed of trust of December, 1894, to secure said notes, that he proceed to sell the land in question for the payment thereof, and, the said Lastinger declining so to do, respondent designated A. S. Keady as trustee under the said deed of trust in the place and stead of Lastinger, who proceeded to advertise the property for sale at public action. In order to enjoin that sale petitioners instituted suit in the District Court of McLennan County, Texas, and obtained a temporary injunction against the said sale, after which the respondent and the said Keady caused the said cause to be removed to the United States Circuit Court for the Western District of Texas. Therein the respondent Mansur filed a cross-bill against the petitioners, praying that the trust deed to Lastinger be decreed to be a valid and existing lien upon the said lot, and that the vendor's lien obtained

by the said Bailey should also be established. To that cross-bill the respondents, among other defenses, set up in their answer that the said promissory notes were barred by the statute of limitations of the State of Texas, which limit the right of suit on debts by contract to the period of four years from the maturity thereof. The said Keady having died pending the suit the Circuit Court of the United States by its decree perpetuated the injunction against the attempted sale.

Decree of the Circuit Court of Appeals.

By a unanimous court (Judges Pardee, McCormick and Shelby, sitting), the action of the Circuit Court was reversed in an opinion delivered by Judge Pardee in which he says: "A statement of the pleadings and facts in this case is unnecessary, because the matters involved are of interest only to the parties to the suit and their counsel, and they are, or ought to be, fully advised.

"An investigation of the case, in the light of the very able briefs submitted, brings us to the conclusion that the correct decision of the case depends upon the construction and effect to be given to that part of the final decree rendered in consolidated cases of Mansur and Tebbetts Implement Company, and Washburn and Moen Manufacturing Company *v.* Provident National Bank, being 131 Equity, Dallas, No. 444, and Provident National Bank *et al*, and W. B. Belknap and Company *v.* Provident National Bank *et al*, No. 132 Equity, in the Circuit Court of the United States for the Northern District of Texas on the 30th of June, 1897, as follows (the extract from the decree heretofore printed). *This decree is conclusive upon all parties and privies among which are the contesting parties in the present suit.* In accordance with the decree the Slayden notes carrying vendor's lien upon Lot 1,

Block 2, of the city of Waco, were paid out of the funds in the registry of the court and were delivered and indorsed to Finks, receiver, 'without recourse,' and thereafter sold for cash which was paid into the registry to be applied as other funds in the registry of the cause, to the judgment of the claims of creditors having liens on and rights thereto. It can not be inferred from the decree that the court intended said notes to be paid off, and the vendor's lien released. As the case stood when the decree was rendered, Slayden had a vendor's lien on property not included in the funds in court, and besides had and was claiming a priority over the other creditors on the fund in court, and there was no object to pay his claim, except for the benefit of the fund in court. The whole matter was one of marshalling securities and adjusting equities among creditors and two courses were open; one was to restrain Slayden from participating in the general creditor's fund until he had exhausted his outside security under his vendor's lien, and the other was by payment and subrogation. Although not specifically stated in his decree, the course pursued was by subrogation, paying Slayden in full on transferring his notes to the receiver, thereby fully and effectively subrogating the receiver to the ownership of the notes with the vendor's lien securing the same. And this was equitable and just and in accordance with the principles of marshalling securities in the text-books: Jeremy Eq. Jur., 528; Adams' Eq., 271, 272; 3 Pom., Sec. 414; Bispham's Prin. Eq., Sec. 350, 341; and declared and applied by Chief Justice Marshall in Alston *v.* Munford, 1 Brock, 268; and in Durham *v.* Rhodes, 23 Maryland, 233; Ross *v.* Duggan, 5 Colorado, 85; Jenness *v.* Robinson, 10 N. H., 215; Tarver *v.* Land Mortgage Bank, 27 S. W. 40; Fears *v.* Albea, 69 Texas, 437. The appellant in this case is the lawful owner and holder of the Slayden notes

with subrogation to the vendor's lien as held by Slayden and as neither the plea of *res adjudicata* nor of laches can avail against him, he is entitled to have a decree foreclosing the said lien as prayed for in his cross-bill. The decree of the Circuit Court is reversed and the case is remanded with instructions to enter a decree in accordance with the views herein expressed."

Only Two Assignments of Error.

This court is asked to reverse the foregoing decree for two and only two reasons. The first assignment of error is this: "The court below erred as follows: 1. In holding that the decree in the consolidated suit requiring Slayden to assign the promissory notes to Finks, receiver, and the receiver to make sale thereof, was conclusive upon the petitioners or either of them, with respect to Lot 1 in Block 2." "*Who are concluded where suits are heard together.*—Generally, where two suits are heard together, if the proper parties are made to either suit, the judgment or decree will be binding upon all, *though all were not made parties to each suit.*" Am. and Eng. Enc. of Law, vol. 24, pp. 734–5, citing Shenandoah Valley National Bank *v.* Bates, 20 W. Va., 210; Waggoner *v.* Wolf, 28 W. Va., 820. Dupree and wife, who were parties to this decree, and who never made any direct attack upon it by appeal or writ of error, cannot make a collateral attack upon it in a proceeding not instituted for the express purpose of annulling, correcting, or modifying it. Their real contention is that the Circuit Court of Appeals erred in so *construing the decree* of the Circuit Court as to make it transfer the Slayden "notes to the receiver, thereby fully and effectively subrogating the receiver to the ownership of the notes with the vendor's lien securing the same." As clearly stated in their petition

for certiorari (p. 5) the precise contention of petitioners is this: "This action of the Circuit Court of Appeals was in effect to hold that the vendor's lien retained by Bailey in his deed of December, 1894, conveying his one-half interest in the property to the petitioner, William E. Dupree, accompanied the promissory notes through their several endorsements from Bailey to Slayden; from Slayden to Finks, receiver; from Finks to Duke; and from Duke to the respondent, and that the latter was entitled to have that lien enforced for the payment of the notes, notwithstanding the petitioner's plea of the statute of limitations." In other words petitioners contend: (1) that the legal effect of the final decree of June 30, 1897, was to annihilate the vendor's lien in question; (2) that if it did not, that result was attained by their plea of the statute of limitations. These contentions, and only these, are embodied in the two assignments of error now before this court.

I.

The Effect of the Decree of June 30, 1897, was to Keep Alive the Indebtedness Evidenced by the Slayden Notes and the Liens on the Realty.

We are not considering whether there was error in the decree which might have been corrected on appeal, nor whether the method adopted for bringing about a marshalling of the securities held by Slayden was the best method. If the language of the decree shows clearly that the intent of the court was to marshal the securities then there was no merger of the notes. The court as a court of equity had the power to have required Slayden first to exhaust his real estate security. There was no suggestion in that record that the real estate was home-

stead. But it would have been a harsh exercise of discretion to have done so, because Slayden's debt, as a real estate debt, was not due; the notes in fact were not due for any purpose. This one which matured January 1, 1897, and all interest on the others, was paid by W. E. Dupree, evidently to prevent the execution of the trust deed or foreclosure of the vendor's lien by suit. Therefore when the decree came to be entered in June, 1897, the court found these notes not due; one would not be due for six months, another would mature in eighteen months, and the other in thirty months. Therefore, resort was had to the device of having the receiver buy the notes from Slayden and sell them again.

Can it be said that this decree merged the notes so that the payment to Slayden operated to extinguish the debt and liens? Cannot a court of equity decree that a lien which otherwise would be merged or extinguished, shall not be, or that what would ordinarily amount to payment shall not have this effect? We think this power cannot be doubted. Then, did the court in this instance intend to prevent the merger, extinguishment and discharge of the Slayden notes and liens on the land? Clearly so, for the decree in precise terms declares the lien and provides for the delivery of the notes and interest coupons to the receiver, endorsed by Slayden "without recourse." This endorsement, which the decree expressly provides for, imports that the documents are still commercial paper and are valid instruments. Further, the provision for the sale of the notes and interest coupons by the receiver shows beyond controversy that the court was of opinion there was something to sell. See Alston *v.* Muneford, Fed. Cases, No. 267; Williams *v.* Washington, 16 N. E., 137; Durham *v.* Rhodes, 23 Md.; Ross *v.* Duggan, 5 Colo., 85; Jenness *v.* Robinson, 10 N. H., 215; Tarver *v.* L. M. Bk., 27 S. W., 40; Fears *v.* Albea, 69 Tex., 437.

The argument, and authorities cited to support it, that Slayden by accepting under the chattel mortgage waived his real estate liens, is based on a misconception of the nature of Slayden's real estate liens. The authorities cited would be in point, and the argument sound, if these real estate liens were implied liens. There is a fundamental distinction between an implied vendor's lien and one expressly reserved in the conveyance or evidence of debt. Here we have the vendor's lien expressly reserved, and in addition we have a duly executed trust deed. The distinction is drawn and applied in the case of Wilcox *v.* National Bank, 93 Tex., 331. Judge Gaines there discusses the question, and after pointing out the difference between an implied vendor's lien (which is the original meaning of the term) and a contract lien for the purchase price, says: "The cases just cited also recognize the doctrine that when an express lien has been reserved, the taking of a new note with additional security, in place of the original note, does not release the lien. A lien created by mortgage, or by an express reservation, exists as long as the debt exists which it secures, unless it be discharged by some valid agreement between the parties. A debt for which a new promise or obligation with a new security is given, is not of necessity and by that fact alone extinguished, unless the parties agree that the new promise is to be taken as a payment of the debt, or that the new security is given in lieu of the old, and in discharge of it. To our mind it is misleading to speak of a waiver of a lien as applicable to such a case. It is not inaccurate to say that a grantor who has made a deed without reserving a lien, and has taken an independent security for the purchase money, has waived his lien, because in such a connection it is merely meant to say that he has waived his right to claim a lien. But when a lien is once created by express

agreement, the land is not to be disencumbered save by a payment of the debt or a contract for the release or discharge of the incumbrance."

EQUITABLE MERGER ALWAYS A QUESTION OF INTENT.

In the Am. and Eng. Enc. of Law, vol. 20, p. 588, the following statements occur: "Merger may be defined as the absorption of one right or liability into another of higher legal degree, which takes place by operation of law where the two rights or liabilities coincide in the same person at the same time. * * * While this is the legal rule, modifications have been introduced in equity so that *as to equitable estates intention is controlling.* * * * and in contracts satisfaction, frequently confounded with merger, depends upon intention. * * * Waiver like equitable merger is generally a question of intent (see the title Waiver)." In vol. 29 of the same work, under the title "Waiver," pp. 1095–96, the following statements occur: "The validity of a waiver requires that it shall have been made intentionally and voluntarily. Indeed, voluntary choice is the essence of waiver, and the view that waiver is a legal result operating upon a certain state of facts, independent of intent, has been declared to be without foundation. It has been held that a waiver never occurs unless intended, or where the act relied on ought in equity to estop the party from denying it. * * * *Evidence of intent*—The existence of an intent to waive is a question of fact, and must be made clearly to appear. *The best evidence of intention is to be found in the language and conduct of the parties.*" That simple rule when applied to the language of the Circuit Court decree of June 30, 1897, solves the whole difficulty. That decree declares in express terms that the parties did not intend a merger but a subrogation.

The receiver Finks was therefore subrogated, "to the ownership of the notes with the vendor's lien securing the same." As he sold them on that basis to the respondent the "conduct of the parties" confirms the "language" of the decree.

Nature of the Vendor's Lien.

A vendor's lien is for all of the purchase money and for every part of it until paid. It is not merely security for notes that may be given for the consideration, but is for the debt of which the notes were evidence. The lien is not affected by taking a new note, for that is but a change of the evidence, and not a payment of the debt. De Cordova *v.* Hood, 17 Wall., 1. *In that case this court held expressly that, in Texas, an assignment of the notes given for purchase money carries with it the vendor's lien to the assignee.* A purchaser of a vendee who assumes payment of the purchase money due from him, takes the property subject to the vendee's liabilities, legal and equitable. Lewis *v.* Hawkins, 23 Wall. 119. It is admitted that the wife of Dupree took the property from him with express notice of the existence of the vendor's lien in question. There is not the slightest evidence that the vendor's lien was ever waived by Slayden. There is no pretense that the petitioners, or either of them, ever paid the purchase money in question, apart from the legal construction claimed for the final decree of June 30, 1897. The writ of certiorari is primarily a means through which this court can secure uniformity of decision. That is the ostensible ground upon which it is invoked in this case. Certainly that contention can have no possible application to the construction of the decree of June 30, 1897, which concerns only the parties interested and rests entirely upon

its own terms. By overturning the construction given that decree by the Circuit Court of Appeals, this court cannot remove "a direct conflict between a decision of the Circuit Court of Appeals of the United States and those of the Supreme Court of Texas, and this over questions purely under the laws of Texas," for the good and sufficient reason that no such conflict exists or can exist.

II.

The Statute of Limitations can Have no Possible Application.

The second assignment of error claims that the court below erred, "In holding that the respondent is entitled to a decree foreclosing in his favor the vendor's lien reserved in the deed of December 31, 1894, as security for the promissory notes." When the argument in support of that assignment is examined it is found to rest entirely upon the contention that the equitable right to have the vendor's lien foreclosed is barred by certain statutes of limitation of the State of Texas, supposed to apply to the enforcement of purely equitable rights on the equity side of a Federal Court. In the petition upon which this writ was obtained it is averred "that the said promissory notes were barred by the statute of limitations of the State of Texas, which limits the right of suit on debts by contract to the period of four years from the maturity thereof,* * * that the assignee of promissory notes for deferred purchase-money, to secure which a lien is reserved, cannot enforce such lien after the statutory bar of limitations has run against the notes themselves, if the maker of the notes relies upon the statute (Stephens *v.* Mathews' Heirs, 69 Tex. 341, 6). Your petitioners are advised and believe, and

therefore aver, that the facts herein set up show a direct conflict between a decision of a Circuit Court of Appeals of the United States and those of the Supreme Court of Texas, and this over questions purely under the laws of Texas, and that they present a case appealing to the exercise by this court of its discretionary power for the issuance of writs of certiorari." The foundationless assumption that a conflict has arisen between the courts of Texas and those of the United States as to the application of a statute of limitations of the former to the enforcement of a right purely equitable in the latter is the sole and only basis upon which the writ in this case was asked. It is very easy to demonstrate that no such conflict has arisen or can possibly arise. It is unnecessary to remind this court that the Federal Courts adopt state statutes of limitation, as such, only so far as they regulate remedies on the common law side of the court. "Sec. 8, STATE STATUTES OF LIMITATIONS. Federal courts of equity usually follow by analogy state statutes of limitations, especially in foreclosure suits and suits against executors and administrators, *but, at least when their jurisdiction is not concurrent with courts of law*, they do not consider themselves bound by such statutes. It has been said that a Federal court of equity will never follow a state statute of limitations when thereby manifest wrong and injustice would be wrought." Foster's Fed. Practice, 3d ed., vol. 1, pp. 15, 16, citing on the last point Fogg *v.* St. Louis, H. & K. R. Co., 17 Fed. R., 871, 873; Story's Eq. Jur., Sec. 1521. In Kirby *v.* Lake Shore R. R. Co., 120 U. S., 130, this court, quoting from Payne *v.* Hook, 7 Wall., 430, has said: "If legal remedies are some times modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equitable. The equity jurisdiction of the courts of the United States is the same that the High Court

of Chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union." This court then said: "It is undoubtedly true, as announced in adjudicated cases, that courts of equity feel themselves bound, *in cases of concurrent jurisdiction*, by the statutes of limitation that govern courts of law in similar circumstances, and that sometimes they act upon the analogy of the like limitation at law. But these general rules must be taken subject to the qualification that the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit." In his note on this case, Rose, in demonstrating that "Federal Courts' equity jurisdiction is not subject to limitation by states," cites "Burdon Central, etc., Co. *v.* Ferris, etc., Mfg. Co., 78 Fed., 422, where, under facts, equitable lien was allowed, although laws of state in which court was sitting would give no lien; Gregg *v.* Sanford, 65 Fed., 157, 28 U. S. App., 313, and Brown *v.* French, 80 Fed., 169, reaffirming the rule." Speaking of the vendor's lien this court said in Slide and Spur Gold Mines *v.* Seymour, 153, U. S. 517, "Such a lien is one which appeals strongly to the favorable consideration of a court of equity," and in Fisher *v.* Shropshire, 147 U. S. 133, "We find no sufficient evidence of waiver here, and we do not regard the lapse of time between the surrender of possession in January, 1881, upon the purchase being made, and the filing of the bill in February, 1883, as justifying a conclusion to that effect." To the enforcement of this purely equitable right, over which a court of law cannot have concurrent jurisdiction, the statute of limitations can never be applied. The only question involved is one of laches.

The Question of Laches.

The case now before this court was begun by petitioners to enjoin a sale under a power—in the words of the petition (p. 4) for certiorari, "to enjoin which sale the petitioners instituted suit in the District Court of McLennan County, Tex., and obtained a temporary injunction against the said sale, after which the respondent and the said Keady caused the said cause to be removed to the United States Circuit Court for the Western District of Texas, in which court, among proceedings, the respondent filed a cross-bill against petitioners, praying both that the deed to Lastinger be decreed to be a valid and existing lieu upon the said lot, and that the vendor's lien obtained by the said Bailey should be established; to which cross-bill the respondents, among other defenses, set up in their answer that the said promissory notes were barred by the statute of limitations of the State of Texas, which limits the right of suit on debts by contract to the period of four years from the maturity thereof." It thus appears in the most positive way that this bill for an injunction, and the cross-bill filed to enforce the vendor's lien, the creature of a court of equity, presents matters *exclusively within the jurisdiction of a court of equity*. It is impossible, therefore, that in dealing with such a suit the jurisdiction of the United States Circuit Court could have been concurrent with the courts of law of Texas in which the statutes of limitation apply. As Foster (Practice, vol. 1, p. 15) has expressed it: "but, at least when their jurisdiction is not concurrent with courts of law, they do not consider themselves bound by such statutes." Thus the statute of limitations, as such, is disposed of. The same author has well said: "It has

been said that a Federal Court of Equity will never follow a State statute of limitation when thereby manifest wrong and injustice would be wrought." Here the monstrous contention is made that, where no innocent third party is concerned, the purchasers of property, who admit they have never paid for it, should be absolved by a federal court of equity, upon principles of analogy to the statute of limitations, because a statutory period of a little more than four years had expired, after the maturity of the last note on January 1, 1900, and the filing of the cross-bill, February 22, 1904. The Circuit Court of Appeals disdained the idea that there had been laches, saying: "The appellant is this case is the lawful owner and holder of the Slayden notes with subrogation to the vendor's lien as held by Slayden, and as neither the plea of *res adjudicata* NOR LACHES can avail against him, he is entitled to have a decree foreclosing the said lien as prayed in his cross-bill."

The Circuit Court of Appeals has thus adjudged, *as a matter of fact*, that the filing of the cross-bill to foreclose the rendor's lien, *within less than two months*, after the lapse of an unusually short statutory period for a suit at law on the notes, *was not laches*. Where there has been a finding of fact in an equity case, and the question here is as to the weight of evidence, the judgment will be affirmed. Alviso *v.* United States, 8 Wall., 339; Harrell *v.* Beall, 17 Wall., 590; Levis *v.* Kengla, 169 U. S., 237. In Griswold *v.* Hazard, 141 U. S., 260, this court said: "Whether laches is to be imputed to a party seeking the aid of a court of equity depends upon the circumstances of the particular case." In Townsend *v.* Vanderwerker, 160 U. S., 171, this court said: "The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether,

under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did." The Circuit Court of Appeals having adjudicated, upon an examination of the evidence in this case, that *a delay of fifty-two days*, after the statutory period fixed as a bar to a suit at law on the notes, did not constitute laches in the filing of the cross-bill to foreclose the vendor's lien, will this court hold on review of that finding of fact, that the weight of the evidence was decidedly the other way?

In its last analysis the case as presented by petitioners in this record on the two assignments of error is this: The Circuit Court of Appeals erred (1) in holding that the right of respondent to foreclose his vendor's lien on the equity side of the Circuit Court was not lost by laches. (2) it erred in holding, under all the circumstances of this case, that *a delay of fifty-two days*, after the lapse of a very short statutory period for a suit on the notes, in the filing of the cross-bill, did not constitute laches. It is here contended, necessarily, that the weight of the evidence on that point is so decidedly against the correctness of the *finding of fact as to laches* made by the Circuit Court of Appeals, that its judgment should be reversed. Each contention is manifestly unsound.

Respectfully submitted.

J. M. McCORMICK,
HANNIS TAYLOR,
Solicitors for Respondent.